IN THE HIGH COURT OF JUDICATURE AT BOBBY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.861 OF 2005

Mr. Dyaneshwar A. Gaikwad ...Petitioner

Vs.

The State of Maharashtra ...Respondent

Mrs. Sulbha A. Dhamale for the Petitioner.
Ms M. H. Mhatre, A.P.P. for the State.
Mr. Anil Subramaniam for the Respondent No.2.

CORAM : A.S.OKA, J.
DATED : JULY 22, 2005.

JUDGMENT:

1. On the last date Counsel appearing for the parties were heard. The Petitioner is the complainant. The Petitioner filed a private complaint against the Respondent No.2 alleging commission of offence under section 379 of the Indian Penal Code. On the said complaint, learned Magistrate passed an order under section 156(3) of the Code of Criminal Procedure, 1973(hereinafter referred to as the said Code of 1973). The allegation of the Petitioner is that he is the owner of a vehicle of Sumo make. It is the case of the Petitioner that the Respondent No.2 had advanced loan for purchasing the said vehicle. In view of hire-purchase Agreement executed by the Petitioner, there is an endorsement of the name of the Respondent in the record of the R.T.O. The case of the Petitioner is that the Respondent No.2 had submitted a letter to the R.T.O., Pune for cancelling the endorsement regarding Hire Purchase Agreement. The allegation of the Petitioner is that on 2nd November, 2000 the representatives of the Respondent No.2 has stolen the said vehicle.

2. An Application was made under section 93 of the said Code of 1973 by the Petitioner praying for search warrant for production of the said vehicle. The said Application was contested by the Respondent No.2. The learned Judicial Magistrate, First Class, Pune decided the said Application by order dated 29th November, 2004. The perusal of the order shows that by the said order the learned Judge directed the Respondent No.2 to execute indemnity bond in the sum of Rs.1,80,000/-. The Petitioner preferred Revision Application against the said order. The said Revision Application has been rejected.

3. The learned Counsel for the Petitioner submitted that the learned Magistrate did not decide the Application made by the Petitioner under section 93 of the said Code of 1973 on merits and while deciding the said Application, learned Judge could not have passed the order that custody of the vehicle be retained with the Respondent No.2 with a direction to the Respondent No.2 to furnish an indemnity bond in the sum of Rs.1,80,000/-. The learned Counsel therefore, submitted that entire approach of the Courts below was erroneous. The learned Counsel for the Respondent No.2 submitted that the Respondent No.2 has taken possession of the vehicle under the terms of the contract executed between the Petitioner and the Respondent No.2. He submitted that there was default

committed by the Petitioner in paying the instalments as a result of which the Respondent No.2 has exercised rights under the contract and has taken possession. He submitted that now the trial is fixed for recording plea and therefore, no interference is called for.

4. I have considered the rival submissions. The Application made by the Petitioner was under section 93 of the said Code of 1973. Under section 93 of the said Code of 1973 where any court has reason to believe that a person to whom the summons under section 91 or a requisition under section 92(1) has been or might be addressed, will not produce the document or thing as required by such summons or requisition or where the court considers that the purposes of any inquiry or trial or proceeding under the Code will be served by the general search or inspection, court may issue search warrant. Though the Application made by the Petitioner was styled as an Application under section 93 of the said Code of 1973, apart from the first prayer made for issuing search warrant, prayer for restoration of possession of the vehicle was also incorporated.

5. Under section 451 of the said Code of 1973 it is provided that when any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion

of the inquiry or trial. The perusal of the order passed by the learned Magistrate shows that the learned Magistrate observed that it is an admitted fact that Petitioner has purchased the vehicle for the amount of Rs.2,10,000/-. The learned Judge observed that having regard to the facts and circumstances of the case, it would be more better to get executed from the Respondent No.2-accused an indemnity bond for the value of the vehicle instead of requiring the Respondent No.2 to produce the vehicle. That is the reason why the learned Judge directed the Respondent No.2 to execute the indemnity bond. Thus, the learned Magistrate has not specifically held that it is not necessary for the Respondent No.2 to produce the vehicle. In Revision Application preferred by the Petitioner, the learned Sessions Judge held that when the Respondent No.2 had submitted his reply in writing resisting the Application made by the Petitioner under Section 93 of the said Code of 1973, it was not necessary for the Respondent No.2 to file separate Application for claiming possession.

6. In my view, the approach of the both the courts below is erroneous. When Application was made under section 93 of the said Code of 1973 by the Petitioner, if the learned Judge was satisfied that there was merit in the Application, he should have allowed the Application and ought to have directed production of vehicle before the Court so that

appropriate orders could have been passed under section 451 of the said Code of 1973. The learned Judge could not have treated the reply filed by the Respondent No.2 as Application for custody of the property. The learned Magistrate has observed that he was of the opinion that it would be more better to require the accused to execute indemnity bond for the value of vehicle instead of requiring him to produce the vehicle. Thus, learned Magistrate was not of the view that the Petitioner has no case seeking production of vehicle before the court. If the learned Judge was of the view that there is no case made out under section 93 of the said Code of 1973 the learned judge could have rejected Application. The impugned order passed by the learned Magistrate has effect of granting relief in favour of the Respondent No.2 in the Application made by the Petitioner.

7. The learned Counsel appearing for the Respondent No.2 fairly stated that as and when the learned Magistrate will direct the Respondent No.2 to produce the vehicle, the Respondent No. 2 will produce the same so that appropriate order can be passed under section 451 of the Code of Criminal Procedure, 1973.

8. As I find that the orders passed by the courts are required to be set aside, the said orders will have to be set aside by passing an order directing the

learned Magistrate to fix a date for the Respondent No.2 to produce the vehicle before him so that appropriate order under section 451 of the said Code can be passed after hearing the parties. After the vehicle is produced before the court if learned Magistrate is not in a position to immediately pass the order under section 451 of the said Code regarding the custody of the vehicle, till such order is passed learned Magistrate can always direct that for ensuring the safety of the vehicle the custody of the vehicle will be retained by the Respondent No.2.

9. Hence, I pass the following order:

: O R D E R :

i) The impugned judgments and orders are quashed and set aside. The learned Judicial Magistrate, First Class, Court No.3, Pune or the concerned court of learned Magistrate to which trial is entrusted will pass an order for directing the Respondent No.2 to produce the vehicle before him on a particular date. After the vehicle is produced, learned Judge will pass appropriate order under session 451 of the Code of Criminal Procedure, 1973 as regards custody of the said vehicle pending the conclusion of the trial. The learned Judge will pass the said order as expeditiously as possible.

ii) If the learned Judge is not in a position to pass the order on the very day on which vehicle is produced, it will be open for the learned Magistrate to authorise the Respondent No.2 to retain the custody of the vehicle till appropriate orders are passed by him subject to such conditions which learned Magistrate may deem proper.

iii) Writ Petition is disposed of in above terms.

iv) All contentions on merits are kept open.

v) Certified copy is expedited.

JUDGE